



**6712-01**

**FEDERAL COMMUNICATIONS COMMISSION**

**[MB Docket No. 18-11; FCC 18-2]**

**Birach Broadcasting Corporation, Applications for Renewal of Licenses of AM Radio Stations WBVA, Bayside, Virginia and WVAB, Virginia Beach, Virginia**

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice.

**SUMMARY:** This document commences a hearing to determine whether the applications filed by Birach Broadcasting Corporation (Birach) to renew its licenses for AM radio stations WBVA, Bayside, Virginia and WVAB, Virginia Beach, Virginia, should be granted. The applications have been designated for hearing based on the stations' extended periods of silence since April 1, 2008, when Birach became the licensee of the stations.

**DATES:** Persons desiring to participate as parties in the hearing shall file a petition for leave to intervene not later than **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER]**.

**ADDRESSES:** File documents with the Office of the Secretary, Federal Communications Commission, 445 12<sup>th</sup> Street, SW, Washington, DC 20554, with a copy mailed to each party to the proceeding. Each document that is filed in this proceeding must display on the front page the docket number of this hearing, "MB Docket No. 18-11."

**FOR FURTHER INFORMATION CONTACT:** Albert Shuldiner, Media Bureau, (202) 418-2700.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Hearing Designation Order (Order), MB Docket No. 18-11, FCC 18-2, adopted January 19, 2018, and released January 22, 2018. The full text of the Order is available for inspection and copying during normal business

hours in the FCC's Reference Information Center at Portals II, CY-A257, 445 12th Street, SW, Washington, DC 20554. The full text is also available online at <http://apps.fcc.gov/ecfs/>.

### **Summary of the Hearing Designation Order**

1. The Order commences a hearing proceeding before the Commission to determine whether the applications filed by Birach Broadcasting Corporation (Birach) to renew the licenses for AM radio stations WBVA, Bayside, Virginia (WBVA Renewal Application), and WVAB(AM), Virginia Beach, Virginia (WVAB Renewal Application) should be granted pursuant to section 309(k)(1) of the Communications Act of 1934 (Act), 47 U.S.C. 309(k)(1). The WBVA Renewal Application and the WVAB Renewal Applications are designated for hearing based on the stations' records of extended periods of silence during and following their license renewal terms.

2. A broadcast licensee's authorization to use radio spectrum in the public interest carries with it the obligation that the station serve its community, providing programming responsive to local needs and interests. Broadcast licensees also are required to operate in compliance with the Act and the Commission's rules (Rules). These requirements include the obligation to transmit potentially lifesaving national level Emergency Alert System (EAS) messages in times of emergency and to engage in periodic tests to ensure that their stations are equipped to do so.

3. The basic duty of broadcast licensees to serve their communities is reflected in the license renewal provisions of the Act. In 1996, Congress revised the Commission's license renewal process and the renewal standards for broadcast stations by adopting Section 309(k) of the Act, 47 U.S.C. 309(k). Section 309(k)(1) of the Act, 47 U.S.C. 309(k)(1), provides that the Commission shall grant a license renewal application if it finds, with respect to the applying station, that during the preceding license term: (a) the station has served the public interest, convenience, and necessity; (b) there have been no serious violations by the licensee of the Act

or the Rules; and (c) there have been no other violations by the licensee of the Act or the Rules which, taken together, would constitute a pattern of abuse. Section 309(k)(2) of the Act, 47 U.S.C. 309(k)(2), provides that if a station fails to meet the foregoing standard, the Commission may deny the renewal application pursuant to section 309(k)(3), 47 U.S.C. 309(k)(3), or grant the application on appropriate terms and conditions, including a short-term renewal. Section 309(k)(3) of the Act, 47 U.S.C. 309(k)(3), provides that if the Commission determines, after notice and opportunity for hearing, that the licensee has failed to meet the standard of section 309(k)(1), 47 U.S.C. 309(k)(1), and that no mitigating factors justify the imposition of lesser sanctions, the Commission shall issue an order denying the license renewal application for the station.

4. The assignment of the licenses of WBVA and WVAB from an estate in bankruptcy to Birach was consummated on April 1, 2008. WBVA's operational history since that date is as follows: (a) silent for 1225 days during the remaining license term from April 1, 2008 to October 1, 2011 (with 151 of those days unauthorized) and for 2186 days from October 2, 2011 to November 30, 2017 (with 141 of those days unauthorized); and (b) operating at 30 watts of power pursuant to special temporary authority (STA) for 54 days during the remaining license term in 2009-2011 (22 days in 2009, 10 days in 2010, and 22 days in 2011) and for 66 days from the end of the license term until November 30, 2017 (14 days in 2012, 6 days in 2013, 4 days in 2014, 8 days in 2015, 8 days in 2016, and 26 days in 2017).

5. WBVA is a Class C AM station licensed to operate with 1 kilowatt of power from a site in Virginia Beach, Virginia. Shortly before Birach purchased WBVA, the interim trustee in bankruptcy filed an application for STA to go silent, explaining that the station's tower had been vandalized and fallen, on or about March 15, 2008. During Birach's tenure as licensee of WBVA for the balance of the license term ending in 2011, the station was silent except for brief

periods of operations from temporary sites with a power level of 30 watts. On May 18, 2011, Birach filed the WBVA Renewal Application.

6. Following the filing of the WBVA Renewal Application, WBVA continued its pattern of brief 30-watt operations followed by extended periods of silence. In 2013, Birach sought and received a construction permit for permanent full-power operation at a new transmitter site. However, that permit expired after three years. Birach stated that it was unable to obtain zoning approval to construct a tower at that site.

7. WBVA's temporary 30-watt operations were limited in the area served as well as the days of operation. Although those low-power operations provided city-grade coverage of the community of license (Bayside, Virginia), they covered approximately ten percent of the station's licensed service area, excluding areas covered by water.

8. WVAB's operational history from April 1, 2008 through November 30, 2017 is as follows: (a) silent for 1231 days during the remaining license term from April 1, 2008 to October 1, 2011 (with 157 of those days unauthorized) and for 1943 days from October 2, 2011 to November 30, 2017 (with 153 of those days unauthorized); and (b) operating at 6 watts of power pursuant to STA for 48 days during the remaining license term in 2009-2011 (16 days in 2009, 10 days in 2010, and 22 days in 2011) and for 309 days from the end of the license term until November 30, 2017 (14 days in 2012, 6 days in 2013, 9 days in 2014, 12 days in 2015, 19 days in 2016, and 249 days in 2017).

9. WVAB is a Class C AM station licensed to operate with 5 kilowatts of power. Within the relevant time periods, WVAB has always been co-located with WBVA. WVAB's operational history has been similar to WBVA's during the time period under review, except WVAB has operated with only 6 watts of power during its STA operations. At the STA power level of 6 watts, WVAB serves only a small portion of its community of license (Virginia Beach,

Virginia). A modification of a licensed AM station requires 50 percent coverage of the population and land area of the station's community of license with a city-grade signal.

WVAB's STA service provides a predicted city-grade signal to only 6.3 percent of the Virginia Beach population and 1.7 percent of the Virginia Beach land area. As for overall signal coverage, WVAB's predicted coverage for its STA operation is less than two percent of its licensed coverage area.

10. Section 309(k)(3) of the Act, 47 U.S.C. 309(k)(3), requires "notice and opportunity for a hearing as provided in subsection (e)." Section 309(e), 47 U.S.C. 309(e), requires a "full hearing in which the applicant and all other parties in interest shall be permitted to participate." The Commission and courts have held that the hearing need not be a trial-type evidentiary hearing meeting the standards of sections 554 and 556 of the Administrative Procedure Act, 5 U.S.C. 554, 556. The Commission has repeatedly observed that trial-type hearings impose significant burdens and delays, both on applicants and the agency. We have found no substantial issues of material fact or any credibility issues regarding these renewal applications. We thus believe cases such as this one can be appropriately resolved with a "paper" hearing.

11. We have identified no substantial and material questions of fact with respect to the WBVA Renewal Application and the WVAB Renewal Application, which present only a narrow range of issues for Commission consideration. Thus, many Subpart B rules are facially irrelevant to this proceeding. In these circumstances, we find that the use of summary procedures would expedite the resolution of this hearing while affording Birach the full hearing required by section 309, 47 U.S.C. 309, and not placing unnecessary burdens on the licensee. Accordingly, we find that the following rules are either inapplicable to or would serve no useful purpose in this proceeding: 47 CFR 1.221(c) – (h); 1.241 – 1.253; 1.255 – 1.279; 1.282(a) and (b)(2); 1.297 – 1.340; and 1.352 – 1.364.

12. Anyone seeking status as a party in interest in this proceeding must file a petition to intervene in accordance with 47 CFR 1.223(a). Anyone else seeking to participate in the hearing as a party may file a petition for leave to intervene in accordance with 47 CFR 1.223(b). Any filing in this docket must be served in accordance with 47 CFR 1.211 on all other parties, including each person or entity that has filed a petition to intervene or petition for leave to intervene, pending a ruling on each such petition. We expect that intervenor status will be granted only with respect to a specific Birach station unless a showing is made that the intervenor has standing to participate more broadly.

13. Birach shall have the right to seek reconsideration of any interlocutory action in this proceeding. Accordingly, we waive the 47 CFR 1.106(a) restriction limiting the filing of a petition for reconsideration by Birach of this hearing designation order.

14. Birach shall file in this docket, within 30 days of publication of notice of the Order in the Federal Register, complete copies of the following records for WBVA and WVAB (as such records exist as of the release date of the Order): (a) all station logs for the relevant license term; (b) all quarterly issues and programs lists for the relevant license term; and (c) to the extent not included in the station logs, all EAS System participant records for the relevant license term. Birach may not destroy or remove any of such records prior to such filing, or redact or modify any information in such records as they exist as of the release date of the Order. In the event that, on or after the release date of the Order, Birach creates or modifies any documents that it so provides, each such document should be prominently marked with the date that it was created or revised (identifying the revision(s)) and Birach should include in the sponsoring affidavit or declaration an explanation of who created or revised the document and when he or she did so. We otherwise will conduct the hearing without discovery, although the Commission or its staff may make inquiries or conduct investigations pursuant to Part 73 of the

Rules and any reports filed in this docket as a result of such inquiries or investigations will become part of the record in this hearing.

15. We will take official notice of all publicly-available Commission records for WBVA and WVAB as part of the record in this docket. Birach has the burden of proceeding with evidence and the burden of proof in this hearing. Within 60 days of publication of notice of the Order in the Federal Register, Birach will file a written direct case on the designated issues for WBVA and WVAB, no longer than 50 pages, and supported by an affidavit or unsworn declaration pursuant to 47 CFR 1.16. Within 30 days of Birach's filing, any other person granted party status may file a responsive submission, no longer than 25 pages and supported by an affidavit or unsworn declaration. Within 10 days of the deadline for filing such responses, Birach may file a rebuttal submission addressing all responses, no longer than 25 pages and supported by an affidavit or unsworn declaration.

16. *Accordingly, it is ordered*, pursuant to sections 309(e) and (k)(3) and 312(g) of the Communications Act of 1934, as amended, 47 U.S.C. 309(e), 309(k)(3) and 312(g), the captioned applications for renewal of licenses for Stations WBVA(AM) and WVAB(AM) *are designated for a hearing* upon the following issues: (a) To determine, with respect to Station WBVA(AM), Bayside, Virginia, whether, during the preceding license term, (i) the station has served the public interest, convenience, and necessity, (ii) there have been any serious violations by the licensee of the Communications Act of 1934, as amended, or the rules and regulations of the Commission, and (iii) there have been any other violations of the Communications Act of 1934, as amended, or the rules and regulations of the Commission which, taken together, would constitute a pattern of abuse; (b) In light of the evidence adduced pursuant to issue (a) above, whether the captioned application for renewal of the license for Station WBVA(AM) should be granted on such terms and conditions as are appropriate,

including renewal for a term less than the maximum otherwise permitted, or denied due to failure to satisfy the requirements of section 309(k)(1) of the Communications Act of 1934, as amended, 47 U.S.C. 309(k)(1); (c) To determine, with respect to Station WVAB(AM), Virginia Beach, Virginia, whether, during the preceding license term, (i) the station has served the public interest, convenience, and necessity, (ii) there have been any serious violations by the licensee of the Communications Act of 1934, as amended, or the rules and regulations of the Commission, and (iii) there have been any other violations of the Communications Act of 1934, as amended, or the rules and regulations of the Commission which, taken together, would constitute a pattern of abuse; and (d) In light of the evidence adduced pursuant to issue (c) above, whether the captioned application for renewal of the license for Station WVAB(AM) should be granted on such terms and conditions as are appropriate, including renewal for a term less than the maximum otherwise permitted, or denied due to failure to satisfy the requirements of section 309(k)(1) of the Communications Act of 1934, as amended, 47 U.S.C. 309(k)(1).

17. *It is further ordered*, pursuant to section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. 309(e), and section 1.254 of the Commission's rules, 47 CFR 1.254, that the burden of proceeding with the introduction of evidence and the burden of proof with respect to the issues specified in Paragraph 22 of the Order shall be on the applicant, Birach Broadcasting Corporation.

18. *It is further ordered* that Birach Broadcasting Corporation *is made a party* to this proceeding.

19. *It is further ordered* that, to avail itself of the opportunity to be heard and the right to present evidence at a hearing in these proceedings, Birach Broadcasting Corporation shall file complete and correct copies of the documents described in Paragraph 20 of the Order, on or before the date specified. If Birach Broadcasting Corporation fails to file such documents for



either WBVA(AM) or WVAB(AM) within the time specified, or a petition to accept, for good cause shown, such filing beyond the expiration of such period, its captioned license renewal application for such station shall be dismissed with prejudice for failure to prosecute and the license of such station shall be terminated.

20. *It is further ordered* that Birach Broadcasting Corporation shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, 47 U.S.C. 311(a)(2), and 47 CFR 73.3594, give notice of the hearing within the time and in the manner prescribed therein, and thereafter submit the statement described in 47 CFR 73.3594(g).

21. *It is further ordered* that a copy of this Order shall be sent by Certified Mail, Return Receipt Requested, and by regular first-class mail to Birach Broadcasting Corporation, 21700 Northwestern Highway, Tower 14, Suite 1190, Southfield MI 48075, with a copy to its counsel of record, John C. Trent, Esq., 200 South Church Street, Woodstock, VA 22664.

22. *It is further ordered* that the Secretary of the Commission shall cause to have this Order or a summary thereof published in the Federal Register.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. 2018-04942 Filed: 3/9/2018 8:45 am; Publication Date: 3/12/2018]